however, a judgment caused by the attorney's negligence will be vacated if the party has a meritorious defense. See *Gideon* v. *Dwyer*, 40 N. Y. Supp. 1053; *Gallins* v. *Globe Rutgers Fire Ins. Co.*, 174 N. C. 553, 94 S. E. 300. And recently jurisdictions that formerly followed the rule of refusing to vacate judgments when the attorney was negligent have created exceptions in extreme cases. See *Patterson* v. *Uncle Sam Oil Co.*, 101 Kan. 40, 165 Pac. 661; *Southwestern Surety Co.* v. *Treadway*, 113 Miss. 189, 74 So. 143. Other jurisdictions, where justice demanded it, have gone a long way to vacate judgments by construing the negligence of the attorney as "excusable neglect." *Reilley* v. *Kinkead*, 181 Ia. 615, 165 N. W. 80; *Citizens Bank* v. *Branden*, 19 N. D. 489, 126 N. W. 102; *Nelson* v. *Minder*, 41 S. D. 150, 169 N. W. 549. It seems that, in the interest of justice between the parties, the lower court in the present case might well have construed the doubts in favor of the application and vacated the judgment. See *Miller* v. *Carr*, 116 Cal. 378, 48 Pac. 324. But in such a case the lower court must be given a wide discretion, and the refusal of the upper court to reverse is therefore justified. See *Rogers* v. *Cummings*, 11 Ia. 459; *Scott* v. *Smith*, 133 Mo. 618, 34 S. W. 864. See 1 FREEMAN, JUDGMENTS, 4 ed., § 106.

LETTERS OF CREDIT — VALIDITY — RELATION OF THE BUYER-SELLER CONTRACT TO THE LETTER OF CREDIT. — The defendant issued a letter of credit addressed to a seller payable on performance of a contract between the seller and the buyer. The defendant refused payment on the ground that the sales contract had become impossible of performance. *Held*, that this is no defense to the letter of credit. *American Steel Co.* v. *Irving National Bank*, 266 Fed. 41 (C. C. A., 2d Circ.).

A buyer and seller entered into a contract for the manufacture and sale of goods, the conditions of which were that the buyer should procure from the National City Bank a letter of credit addressed to the seller, that shipments and payments should be made by instalments, that the seller should draw on the bank upon shipment of each instalment, and that if any shipment should be delayed a specified length of time the buyer had the option of cancelling that instalment. The letter of credit was accordingly procured. Subsequently the seller was unable to supply one shipment, and the buyer exercised his option of cancellation. The buyer sought to enjoin the seller from drawing that particular draft and the bank from paying it. *Held*, that the injunction be denied. *Frey & Son* v. *Sherburne & Co. and the National City Bank*, 184 N. Y. Supp. 661.

For a discussion of the principles involved in these cases, see NOTES, p. 533, *supra*.

LIMITATION OF ACTION — NEW PROMISE — EFFECT OF ACCOUNT STATED — ACCOUNT STATED BY RETENTION. — A statute requires that a new promise, to take a debt out of the statute of limitations, must be in writing. (MONT. CODE CIV. PROC., § 555.) The defendant became indebted to the plaintiff for goods sold and delivered. Shortly afterwards the plaintiff rendered an account which the defendant retained without objecting. In an action the defendant pleads the statute of limitations. The statutory period has run from the date of the original debt but not from the date of the account stated. *Held*, that the statute is not a defense. *O'Hanlon Co.* v. *Jess*, 193 Pac. 65 (Mont.).

It is generally held that the retention of an account rendered, without objection, is evidence of an assent thereto, creating an account stated. *Baltimore & Ohio Ry.* v. *Berkeley Springs Ry.*, 168 Fed. 770; *Locke* v. *Woodman*, 216 S. W. 1006 (Mo. App.). A distinction should be drawn between an account stated as a computation and one stated as a compromise. The former constitutes a new promise to pay a prior indebtedness. *Chase* v. *Trafford*, 116 Mass. 529.

The latter constitutes a new contract, complete with present consideration. See 3 WILLISTON, CONTRACTS, § 1862. The statutory requirement that a new promise be in writing should apply only to the former. *Devine* v. *Murphy*, 168 Mass. 249, 46 N. E. 1066. This distinction is not consistently drawn, but is suggested in several cases. See *Delabarre* v. *McAlpin*, 101 App. Div. 468, 471, 92 N. Y. Supp. 129, 131. If a new promise must be in writing, it should be entirely immaterial, on principle, whether it was made before the original indebtedness was barred, or after. *Wells* v. *Moor*, 42 Tex. Civ. App. 47, 93 S. W. 220; *Matter of Goss*, 98 App. Div. 489, 90 N. Y. Supp. 769. But a number of cases agree with the principal case in holding that the requirement does not apply to an account which was stated before the statute had run upon the prior indebtedness. *Fox* v. *Patachnikoff*, 75 Misc. 113, 132 N. Y. Supp. 840; *Auzerais* v. *Naglee*, 74 Cal. 60, 15 Pac. 371.

MANDAMUS — ACTS SUBJECT TO MANDAMUS — INJUNCTION IMPROPERLY DENIED MAY BE OBTAINED BY MANDAMUS. — The plaintiff's building encroached upon a public street. A judgment was obtained ordering its abatement as a public nuisance. The municipal council passed an ordinance granting title to the street to the plaintiff in exchange for other land. The plaintiff's application for a temporary injunction restraining the execution of the judgment was denied. The plaintiff then applied for a writ of mandamus ordering the lower court to issue the injunction. *Held*, that the writ of mandamus will lie. *State ex rel. Ruddock Orleans Cypress Co.* v. *Knop*, 86 So. 493 (La.).

Mandamus will not lie if there be any other adequate remedy, such as appeal or writ of error. *Ex parte Virginia Commissioners*, 112 U. S. 177; *People* v. *Crennan*, 141 N. Y. 239, 36 N. E. 187. A public officer cannot be mandamused to perform duties involving the use of discretion. *Secretary* v. *McGarrahan*, 9 Wall. (U. S.) 298; *People* v. *Commissioners*, 149 N. Y. 26, 43 N. E. 418. The Louisiana Code substantially embodies these two principles. See GARLAND'S REVISED CODE OF PRACTICE OF LOUISIANA, Art. 831, 837. It does not appear that the plaintiff's remedy by appeal would have been inadequate. Moreover, the granting or withholding of an injunction by a court is not regarded as a ministerial act. *McMillen* v. *Smith*, 26 Ark. 613. See HIGH, EXTRAORDINARY LEGAL REMEDIES, 3 ed., 181. The Louisiana courts, however, have ruled persistently that when a plaintiff presents a case plainly calling for injunctive relief, it is but a ministerial act to grant the injunction. *State* v. *Young*, 38 La. Ann. 923; *State* v. *Judge*, 40 La. Ann. 206, 3 So. 561; see *State* v. *Judge*, 36 La. Ann. 578, 580–582. These decisions ignore the fact that the determination of what is the proper law in a particular case necessitates the exercise of judgment — the criterion of a discretionary act. An injunction does not issue mechanically as an automobile license upon the fulfillment of the requirements of a specified statute. It is difficult to support the principal case.

MARRIAGE — VALIDITY — COMMON-LAW MARRIAGE — MISTAKE AS TO EXISTENCE OF PRIOR MARRIAGE BETWEEN THE PARTIES. — A man divorced from his former wife induced her, by a false statement that he had not procured a divorce, to resume marital relations with him. *Held*, that the woman is entitled to a widow's interest in his estate. *Wandall's Estate*, 77 Leg. Intell. 925 (Pa.).

The fundamental principle of all marriage is mutual consent. *Great Northern Railway Co.* v. *Johnson*, 254 Fed. 683; *Dorgeloh* v. *Murtha*, 92 Misc. 279, 156 N. Y. Supp. 181. See 1 HOWARD, HISTORY OF MATRIMONIAL INSTITUTIONS, 201. But if one party, apparently consenting, thereby induces the other party reasonably to enter a matrimonial relation with him, his lack of actual consent will not invalidate the marriage. *Williams* v. *Kilburn*, 88 Mich. 279, 50 N. W.